IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

WORD MUSIC, LLC, et al.,	)	
	)	
Plaintiffs,	)	**CASE NO. 3:07-cv-0502**
	)	**JUDGE HAYNES**
v.	)	**JURY DEMAND**
	)	
PRIDDIS MUSIC, INC., et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants Priddis Music, Inc., Richard L. Priddis and Prosound Karaoke, Ltd. (hereinafter the "Priddis Defendants"), by and through undersigned counsel, hereby submit this Memorandum of Law in Support of their Motion to Dismiss.

I. ARGUMENT

A. Rule 12(b) of the Federal Rules of Civil Procedure

Rule 12(b) provides in pertinent part as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, (3) improper venue . . . . No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

B. 28 U.S.C. § 1406(a)

28 U.S.C. § 1406(a) provides in pertinent part as follows: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss . . . such case . . . . "

Dockets.Justia.com

C. Venue Is Improper Under the First-To-File Rule.

The first-to-file rule is a well-established doctrine which promotes comity among federal courts of equal rank, and the rule provides that when actions involving nearly identical parties and issues have been filed in two different federal district courts, "the court in which the first suit was filed should generally proceed to judgment." In re Burley, 738 F.2d 981, 988 (9th Cir. 1984) (copy attached). The Sixth Circuit, although not always using the name "first-to-file rule," relies upon and employs the doctrine. See In re American Med. Sys., Inc., 75 F.3d 1069, 1088 (6th Cir. 1996); Barber-Greene v. Blaw-Knox Co., 239 F.2d 774, 778 (6th Cir. 1957); Plating Resources, Inc. v. UTI Corp., 47 F. Supp 2d 899, 903 (N.D. Ohio 1999). The first-to-file rule encourages judicial efficiency and seeks to avoid duplicative litigation. In re American Med. Sys., Inc., 75 F.3d at 1088. The United States Court of Appeals for the Sixth Circuit has explained that the first court to receive filing of suit should proceed with the case to avoid confusion and uncertainty. Barber-Greene v. Blaw-Knox Co., 239 F.2d at 778.

According to the United States Court of Appeals for the Ninth Circuit, district courts must consider the following threshold factors when deciding whether to apply the first-to-file rule: 1) the chronology of the two actions; 2) the similarity of the parties; and 3) the similarity of the issues. Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982) (copy attached); Ward v. Follett Corp., 158 F.R.D. 645, 648 (N.D. Cal. 1994) (copy attached). When establishing chronology, courts should focus on the date "a party filed its original, rather than its amended complaint." Plating Resources, Inc. v. UTI Corp., 47 F. Supp 2d at 903 (quoting Ward v. Follett Corp., 158 F.R.D. 645, 648 (N.D. Cal. 1994) (copy attached)). When comparing the first-filed suit with the later-filed suit, perfectly identical parties and issues are not absolute requirements. Plating Resources, Inc. v. UTI Corp., 47 F. Supp 2d at 903. Also, according to the United States Court of Appeals for the Federal Circuit, a district court may not deviate from the first-to-file presumption solely because the first-filed claim was anticipatory of the later-filed claim. Electronics for Imaging, Inc. v. Coyle, 394 F.3d 1341, 1347-1348 (C.A. Fed. 2005) (copy attached).

The first-to-file rule allows a district court to dismiss the later-filed action. Ward v. Follett Corp., 158 F.R.D. at 648 (copy attached). Concerning dismissal of the later-filed complaint, Federal Practice and Procedure provides in pertinent part as follows:

> When two actions involving nearly identical parties and closely related . . . infringement questions are filed in separate districts, which happens with some frequency in contemporary litigation, the general rule is that the case first filed takes priority, and the subsequently filed suit should be dismissed or transferred or stayed.

Wright and Miller, Federal Practice and Procedure, 14D FPP § 3823 (2007 ed.).

The Plaintiffs filed their Complaint on or about May 8, 2007. However, on or about April 17, 2007, Mediostream, Inc. (hereinafter "Mediostream"), a Defendant in this cause, filed a Complaint for Declaratory Relief and Indemnification in the United States District Court for the Northern District of California, styled as Mediostream, Inc. v. Priddis Music, Inc. and Warner/Chappell Music, Inc., U.S. District Court, Northern District of California, Case Number C07-2127 PDH (hereinafter the "First-Filed Action")[1]. On or about May 14, 2007, Mediostream amended the First-Filed Action by filing its First Amended Complaint for Declaratory Relief and Indemnification[2].

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[1] The United States Court of Appeals for the Sixth Circuit applies the following two principles when determining whether a declaratory ruling is appropriate: 1) whether the declaratory judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and 2) whether the judgment will

Of the sixteen parties involved in this action, only four, Defendants D.J. Miller Music Distributors, Inc., Dale S. Miller, Prosound Karaoke, Ltd. and Richard L. Priddis, are not parties in the First-Filed Action. See First-Filed Action. The Plaintiffs' allegations concerning copyrights they claim to own in certain recorded musical works and their allegations concerning the extent to which they have licensed Mediostream and the Priddis Defendants to reproduce and distribute those works are the central issues in both the First-Filed Action and this cause. See Complaint at 1, 15, 16 and 17; See also First-Filed Action at 4, 6, 7, 8 and 9. Further, both suits involve Mediostream's KSUPERSTAR website and whether Mediostream and/or Defendant Priddis Music, Inc. infringed upon the Plaintiffs' alleged copyrights via website activity. See Complaint at 15 and 17; See also First-Filed Action at 7.

Because the original date of the First-Filed Action pre-dates the filing of this action, and because the two cases involve nearly identical parties and issues, the Priddis Defendants seek the dismissal of the Complaint in this action.

D. The Plaintiffs Fail to Establish that the Priddis Defendants Purposefully Availed Themselves of the Middle District of Tennessee.

1. 28 U.S.C. § 1400(a) Controls Venue in Copyright Infringement Actions.

28 U.S.C. § 1400(a) provides in pertinent part as follows: "Civil actions, suits or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted *in the district in which the defendant or his agent resides or may be found*." (emphasis supplied). In Lumiere v. Mae Edna Wilder, Inc., the Supreme Court of the

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terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. Grand Trunk Western Railroad Company v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984).

[2] In the First Amended Complaint for Declaratory Relief and Indemnification, counsel for Mediostream explains that he would have named all of the Plaintiffs in the original filing, but for representations of opposing counsel concerning the true identity of the alleged copyright owners. See First-Filed Action at 4.

United States held that "venue of suits for infringement of copyright is not determined by the general [federal venue statute] governing suits in the federal district courts," but, instead, by a specific venue provision, which was at that time located within the Copyright Act of 1909, and is now codified by the specific federal venue statute, 28 U.S.C. § 1400(a)[3]. Lumiere v. Mae Edna Wilder, Inc., 261 U.S. 174, 176, 43 S.Ct. 312, 67 L.Ed. 596, 599 (1923). Today, federal courts, including courts within the Sixth Circuit, continue to examine venue in copyright actions under 28 U.S.C. § 1400(a), rather than 28 U.S.C. § 1391(b)[4]. See Summit Training Source, Inc. v. Mastery Technologies, Inc., 2000 WL 35442327, 9-10 (W.D. Mich. 2000) (copy attached); Brink v. Ecologic et al., 987 F. Supp. 958, 965 (E.D. Mich. 1997); Mihalek Corp. v. Michigan, 595 F. Supp. 903, 906 (E.D. Mich. 1984), aff'd, 814 F.2d 290 (6th Cir. 1987). Patry on Copyright comments on proper venue in copyright actions in pertinent part as follows:

> Surprisingly, many courts continue to mistakenly analyze copyright venue issues pursuant to section 1391(b)(2) rather than section 1400(a). Neither does section 1391(c) governing venue where the defendant is a corporation apply; instead, *section 1400(a) is the sole and exclusive provision controlling venue in a copyright infringement action*. (emphasis supplied).

William F. Patry, Patry on Copyright, § 17:200, at 528 (2006 ed.).

2. Establishing Venue in Copyright Infringement Actions

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[3] Section 35 of the Copyright Act of 1909 was nearly identical to 28 U.S.C. § 1400(a) and provided in pertinent part as follows: " . . . civil actions, suits, or proceedings arising under this Act may be constituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found."

[4] 28 U.S.C. § 1391(b)(2) provides in pertinent part that venue in civil actions not founded solely on diversity is proper in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ."

The burden is on the plaintiff to establish whether venue is proper[5], and venue must be proper for *each* defendant in order for the district court to retain the action in question. Salpoglou v. Schlomo Widder, M.D., 899 F. Supp. 835, 839 (D. Mass. 1995); Jarrett v. State of North Carolina, 868 F. Supp. 155, 158 (D.S.C. 1994); Kepler v. ITT Sheraton Corp., 860 F. Supp. 393, 396 (E.D. Mich. 1994). According to the Supreme Court of the United States, courts should ignore the plaintiff's convenience when considering whether venue is proper, as "it is absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts." Leroy v. Great Western United Corp., 443 U.S. 173, 185, 99 S.Ct. 2710, 61 L.Ed. 464, 1979 U.S. LEXIS 143 (1979)[6].

The general rule of construction concerning 28 U.S.C. § 1400(a) is that a defendant or his agent "may be found" in any judicial district in which he is amenable to personal jurisdiction or wherever he may be validly served with process. Brink v. Ecologic et al., 987 F. Supp. at 965; Mihalek Corp. v. Michigan, 595 F. Supp. at 906. See also Summit Training Source, Inc. v. Mastery Technologies, Inc., 2000 WL 35442327 at 9-10 (copy attached). In a case of first impression in the federal courts, the United States Court of Appeals for the Seventh Circuit, analyzing whether the defendant could be found within the court's jurisdiction for purposes of 28 U.S.C. § 1400(a), and examining the defendant's contacts within the court's specific district, addressed the issue

[5] The plaintiff has the burden of establishing a prima facie showing of personal jurisdiction over the defendant, as well, and the plaintiff must do so by establishing with reasonable particularity sufficient contacts between the defendant and the forum state. Theunissen v. Matthews, 935 F.3d 1454, 1458 (6th Cir. 1991); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 887 (6th Cir. 2002).

[6] See also Time Inc. v. Manning, 366 F.2d 690, 696 (5th Cir. 1966) (holding that venue statutes are primarily concerned with the inconvenience to the defendant of litigating in a particular forum) (copy attached).

of whether the plaintiff filed its action for copyright infringement in the proper venue and held in pertinent part as follows:

> [W]e hold that section 1400(a) requires district courts to consider a defendant's contacts with a particular judicial district in determining where that defendant may be found. A defendant's amenability to personal jurisdiction must relate to the judicial district in which the action was filed to place venue there under section 1400(a).

Milwaukee Concrete Studios, Ltd. v. Fjeld Manufacturing Co., 8 F.3d 441, 445 (7th Cir. 1993) (copy attached). The Milwaukee Concrete court found that the defendant failed to establish contacts within the court's district that were sufficient enough to confer personal jurisdiction under the Wisconsin long-arm statute and that, therefore, the defendant could not be found within that district. Milwaukee Concrete Studios, Ltd. v. Fjeld Manufacturing Co., 8 F.3d at 448 (copy attached). In sum, 28 U.S.C. § 1400(a)'s "may be found" language triggers an examination of a defendant's minimum contacts within the specific judicial district where suit has been filed to ascertain whether the court has personal jurisdiction over the defendant and, therefore, whether venue is proper. Milwaukee Concrete Studios, Ltd. v. Fjeld Manufacturing Co., 8 F.3d at 448 (copy attached); Summit Training Source, Inc. v. Mastery Technologies, Inc., 2000 WL 35442327 at 9-10 (copy attached).

A plaintiff must show that a defendant has sufficient minimum contacts with the forum such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); Youn v. Track, Inc., 324 F.3d 409, 417 (6th Cir. 2003). Courts should ensure that defendants will not be haled into a particular forum on the basis of random, fortuitous or attenuated activity, or by the unilateral activity of some other party or person. Youn v. Track, Inc., 324 F.3d at 417.

General jurisdiction may be exercised over nonresident defendants in a suit that "does not arise out of or relate to the contacts with the forum state but rather the defendant[s'] contacts with the forum state that are so continuous and systematic that jurisdiction is proper." Youn v. Track, Inc., 324 F.3d at 418. The United States Court of Appeals for the Sixth Circuit has held that specific jurisdiction subjects the defendant to suit in the forum state only on claims that arise out of or relate to the defendant's contact with the forum. Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d 214, 218 (6th Cir. 2006); Youn v. Track, Inc., 324 F.3d at 418. Specific jurisdiction is valid only if it satisfies the state long-arm statute *and* constitutional due process requirements. Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000).

Tennessee's long-arm statute allows for jurisdiction to the fullest extent possible under the Due Process Clause and provides that a defendant subjects himself to jurisdiction in this state due to the transaction of any business within the state, any tortious act or omission within this state, the ownership or possession of any interest in property located within this state, or entering into a contract for services to be rendered or for materials to be furnished within this state. See T.C.A. § 20-2-214(a)(1), (2), (3) and (5).

The Sixth Circuit uses a three-part test for determining whether a court may exercise specific jurisdiction over a defendant consistent with due process and, therefore, whether exercising personal jurisdiction over that defendant via Tennessee's long-arm statute is proper. Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381-382

(6th Cir. 1968). The United States Court of Appeals for the Sixth Circuit, in Southern Machine Co. v. Mohasco Indus., Inc., introduced this test, holding in pertinent part as follows:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d at 381-382. The Sixth Circuit views the purposeful availment prong of the Southern Machine test as "essential to a finding of personal jurisdiction." Intera Corp. v. Henderson, 428 F.3d 605 (6th Cir. 2005).

The Sixth Circuit, when considering whether a defendant has purposefully availed himself of the forum, considers whether he has "engaged in some overt actions which connect the defendant with the forum state." Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d at 218. In order to make that determination, the Sixth Circuit utilizes the "stream of commerce plus" test, which arises from the United States Supreme Court's opinion in Asahi Metal Indus. Co. v. Superior Court of California. Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d at 220; Koch v. Local 438, United Autoworkers Union et al., 54 Fed.Appx. 807, 809-810 (6th Cir. 2002); Asahi Metal Indus. Co. v. Superior Court of Calif., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed. 2d (1987). The stream of commerce plus test, as set forth in the Asahi opinion, provides as follows:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum

> State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.* (emphasis supplied).

Asahi Metal Indus. Co. v. Superior Court of Calif., 480 U.S. at 112. In Young v. Affilatrici, the United States District Court for the Middle District of Tennessee, Nashville Division, employed the stream of commerce plus test and found that one of the defendants had not purposefully availed itself of the Middle District of Tennessee, holding in pertinent part as follows:

> The record shows Affilatrici's involvement in this case to be isolated and simple . . . . The evidence merely shows that Affilatrici entered the grinder into the stream of commerce. However, that is not enough under Asahi.

Young v. Affilatrici, 2007 U.S. Dist. LEXIS 13209, 28-29 (M.D. TN 2007).

3. The Plaintiffs Rely On Inapplicable Venue Statutes.

In the "Jurisdiction and Venue" portion of their Complaint, the Plaintiffs state in pertinent part as follows:

> This is an action for copyright infringement arising under the Copyright Act of 1976, 17 U.S.C. § § 101 *et seq*. . . . Venue is proper in this district under 28 U.S.C. §§ 1391 and 1400(a) and 1400(b).

See Complaint at 1 and 2. 28 U.S.C. § 1400(a), however, is the exclusive provision controlling venue in copyright infringement actions. Lumiere v. Mae Edna Wilder, Inc., 261 U.S. at 176; Summit Training Source, Inc. v. Mastery Technologies, Inc., 2000 WL 35442327 at 9-10 (copy attached); Brink. v. Ecologic et al., 987 F. Supp. at 965; Mihalek

Corp. v. Michigan, 595 F. Supp. at 906. See also William F. Patry, Patry on Copyright, § 17:200, at 528. Further, 28 U.S.C. § 1400(b) controls venue in patent cases only[7].

4. The Plaintiffs Fail to Establish Proper Venue Under 28 U.S.C. § 1400(a).

In the Complaint, the Plaintiffs identify the specific allegations they would assert establish venue in the Middle District of Tennessee, stating in pertinent part as follows:

> Specifically, Defendants are doing business in the Middle District of Tennessee through the distribution, advertising, and offering for sale of infringing karaoke recordings for interactive internet purchase in the Middle District of Tennessee.

See Complaint at 20. Further, the Plaintiffs identify two "interactive internet websites," K SUPERSTAR and PROSING, which allegedly distribute, advertise, promote and sell music recordings which the Plaintiffs claim are unlicensed and, therefore, infringing upon their copyrights. See Complaint at 17 and 18.

The allegations contained in the Complaint, as well as the Plaintiffs' assertions concerning proper venue and jurisdiction, arise uniquely and exclusively from activity allegedly conducted by the Defendants on the K SUPERSTAR and PROSING websites. See Complaint at 15, 16, 17, 18, 20, 23, 24, 30 and 31. The Plaintiffs explain in their Complaint the manner in which the K SUPERSTAR and PROSING websites operate, and the Plaintiffs describe in detail the manner in which the "infringing recordings" allegedly function within these websites. Id. The Plaintiffs allege that the K SUPERSTAR and PROSING websites feature unlicensed recordings "manufactured by the Priddis Defendants." See Complaint at 17 and 18.

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[7] 28 U.S.C. § 1400(b) provides as follows: "Any civil action for *patent infringement* may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." (emphasis supplied).

The Plaintiffs, however, do not allege that the Priddis Defendants operate the K SUPERSTAR and PROSING websites, and the Plaintiffs assert specifically that the other Defendants operate these websites. See Complaint at 15, 16, 17 and 18. None of the Defendants are residents of the State of Tennessee. See Complaint at 13, 16, 17, 18 and 19.

Further, the Complaint is devoid of any connection between the Priddis Defendants and the Middle District of Tennessee which could rise to purposeful availment such that the Priddis Defendants could be "found" within this forum. The Plaintiffs would assert that the Middle District of Tennessee is the proper venue for this dispute because the Priddis Defendants allegedly placed infringing music recordings within the market place in the Middle District of Tennessee via internet websites which the Priddis Defendants, by the Plaintiffs' own admissions, do not operate. See Complaint at 17 and 18. The Plaintiffs do not assert that the Priddis Defendants designed any product specifically for, or aimed any activity directly at, the Middle District of Tennessee. However, the Plaintiffs, three of whom are Tennessee limited liability companies, assert venue to be proper in the Middle District of Tennessee, despite the fact that none of the Defendants reside in Tennessee. See Complaint at 20.

Additionally, the Plaintiffs do not allege that their claims arise from the Priddis Defendants' activities within and directed at the Middle District of Tennessee. The Plaintiffs allege merely that the Priddis Defendants are subject to personal jurisdiction in this forum because the other Defendants allegedly feature infringing music recordings on their own websites which are accessible within the forum[8]. See Complaint at 15, 16, 17,

[8] The Sixth Circuit has considered this sort of "internet jurisdiction," holding in pertinent part as follows:

> When the defendant's alleged contact with the forum state occurs via the internet,

18 and 20. The Plaintiffs fail to allege any overt action on the part of the Priddis Defendants which connects them with the Middle District of Tennessee and from which the Plaintiffs' claims arise.

In addition, forcing the Priddis Defendants' to litigate this dispute in the Middle District of Tennessee would be unreasonable, unfair and oppressive, considering especially that the Priddis Defendants consist of residents of the United Kingdom[9], Nevada and Utah. See Complaint. The remaining Defendants reside in California and Colorado. See Complaint at 17, 18 and 19. The vast majority of persons with knowledge of the Priddis Defendants' business operations, recording techniques, licensing practices, and sales and marketing activities are located hundreds of miles outside the Middle District of Tennessee, and the cost and inconvenience of bringing these individuals into this forum would be unduly burdensome.

In sum, the Plaintiffs' allegations concerning the Priddis Defendants' awareness that the stream of commerce might sweep the "infringing karaoke recordings" into the Middle District of Tennessee via the other Defendants' websites does not convert the mere act of placing the allegedly infringing recordings into the stream into an act purposefully directed toward this forum. Also, the Plaintiffs' allegations do not establish

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> the plaintiff faces an initial hurdle in showing where this internet conduct took place for jurisdictional purposes. We have held that the operation of "a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction," even where the website enables the defendant to do business with residents of the forum state, because such activity does not approximate physical presence within the state's borders.

The Cadle Company v. Schlichtmann, 123 Fed. Appx. 675, 677 (6th Cir. 2005) (quoting Bird v. Parsons, 289 F.3d 865, 874 (6th Cir. 2002).

[9] According to the United States Court of Appeals for the Sixth Circuit, "great care and reserve should be exercised when extending our notion of personal jurisdiction into the international field." Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d at 223.

that the Priddis Defendants could reasonably have anticipated being haled into court within the Middle District of Tennessee.

II. CONCLUSION

Based on the foregoing, the Priddis Defendants respectfully request that the Court grant their Motion to Dismiss and enter an Order dismissing the Complaint.

Respectfully submitted,

s/ Jeff T. Goodson
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic means via the Court's ECF system upon the following:

1. Timothy L. Warnock, Bowen, Riley, Warnock & Jacobson, PLC, 1906 West End Avenue, Nashville, TN 37203; and
2. Paul Harrison Stacey, Law Offices of Paul Harrison Stacey, P.C., 7225 N. Spring Gulch Road, P.O. Box 4157, Jackson, WY 83001

and by United States Mail upon the following:

1. Frear Stephen Schmid, 177 Post Street, Suite 890, San Francisco, CA 94108; and
2. Owen Borum, Caplan and Earnest LLC, One Boulder Plaza, 1800 Broadway, Suite 200, Boulder, CO 80302-6737

on this the 1st day of June, 2007.

s/ Jeff T. Goodson
Jeff T. Goodson